Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 95-61
Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF
JAMES CABLE PARTNERS, L. P.

I. INTRODUCTION

James Cable Partners, L.P. ("James") submits these Comments pursuant to the Notice of Inquiry ("NOI") released on May 24, 1995 in the referenced matter. James limits its Comments to the questions posed in Paragraph 29 of the NOI, which address the issues of franchise exclusivity and competitiveness.

The Commission is aware that James instituted and prevailed in litigation in the United States Court of Appeals for the Sixth Circuit concerning the applicability of Section 621(a) of the 1992 Cable Act, 47 U.S.C. § 541(a), to preexisting exclusive cable television franchises. *See James Cable Partners, L.P. v. City of Jamestown*, 43 F.3d 277 (6th Cir. 1995) ("*James Cable Partners*"). In that action, the Court of Appeals held that there was no indication in either the express terms of the Act or in its legislative history that Congress, in enacting Section 621(a), intended that the provision's prohibition of the "grant" of exclusive franchises should apply retroactively to invalidate preexisting exclusive franchises. Another circuit court of appeals, erroneously James believes, reached the contrary conclusion that, where an application for a competing franchise is filed, Section 621(a) does apply retroactively to invalidate the exclusivity

of a preexisting exclusive cable television franchise *See Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178 (11th Cir. 1993) ("*Cox Cable*").

The Commission, believing that Section 621(a) should apply to "all denials of franchises including those that would compete with existing franchises," NOI at ¶ 29, and that failure to do so will interfere with achievement of the Act's pro-competitive purposes,[1] has stated on several occasions that it intends to recommend to Congress that Section 621(a) be amended so as to apply retroactively to abrogate the exclusivity of preexisting exclusive franchises. James takes the opportunity of the NOI to point out the flaws in the Commission's premise that application of Section 621(a) on a *prospective-only* basis will undermine the development of competition to cable operators, and to demonstrate that Section 621(a) cannot properly, lawfully or fairly be applied retroactively to preexisting exclusive franchises.

II. DISCUSSION

The NOI states that it "is designed to assist the Commission in gathering the information necessary to prepare the second . . . annual report[to Congress] on competition in the market for delivery of video programming."[2] Toward fulfilling its mission, the Commission asks the following questions:

(a) To what extent do cable systems have exclusive franchises?

(b) How many, if any, applications for competitive franchises have been filed since the enactment of the 1992 Cable Act? How many competitive

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[1] *See, e.g.*, Communications Act, § 601(6), 47 U.S.C. § 521(6); § 623(a)(2), 47 U.S.C. § 543(a)(2); 628(a), 47 U.S.C. § 548(a).

[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 95-61, FCC 95-186 at ¶ 1 (May 24, 1995).

franchises have been awarded? How many have been denied? Has Section 621(a) promoted the award of competitive franchises?

(c) To what extent have the activities of local franchising authorities been an impediment to overbuilding by additional cable systems? Have incumbent cable operators used local franchising processes to delay or prevent overbuilding?[3]

James addresses these questions in turn.

A. "To what extent do cable systems have exclusive franchises?"

1. Very Few Exclusive Cable Television Franchises Were Granted Prior To The 1992 Cable Act, And Fewer Still Remain In Effect Today

James has been unable to locate any survey or other compilation that might answer the Commission's first question. While news and industry reports have on occasion referenced the supposed existence of numerous exclusive cable television franchises across the nation,[4] not one of the articles that James has reviewed[5] cited any support -- survey, data compilation, or other public or private source -- for this broad claim. Indeed, except for references to the exclusive franchises involved in the *James Cable Partners* and *Cox Cable* cases, there was virtually no specific mention or identification of any particular exclusive franchise. The lack of empirical support for the ***myth*** of exclusive franchises is explained by a number of factors, including: (1)

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[3] *Id.* at ¶ 29.

[4] *See, e.g., Consumers Research Magazine*, Oct. 1994 at 14 (1970's saw municipalities awarding exclusive franchises, which led to 97% single-provider communities).

[5] James' attorneys conducted a NEXIS search of the NEWS library, ALL NEWS file (including ARCHIVE NEWS) to identify all articles in general or trade publications that made any reference to exclusive cable television franchises.

relatively few exclusive franchises have been awarded in the industry's history;[6] (2) of those that were awarded on an exclusive basis, most were awarded prior to the 1984 Cable Act and have already expired;[7] (3) where renewed, such franchises generally have been renewed on a non-exclusive basis; (4) in recent years, since enactment of the 1992 Cable Act, cities have not granted new or renewal franchises on an exclusive basis; and (5) the general and trade press reports that have alluded to the existence of significant numbers of exclusive franchises generally have confused franchise exclusivity with single provider circumstances where operators, although not subject to present competition from another cable system, operate pursuant to a *non-exclusive* franchise.[8]

Based on its research, therefore, James concludes that very few exclusive franchises have been granted during the history of the cable television industry. Fewer still appear to be currently outstanding, as even long-term exclusive contracts continue to expire after passage of the 1992 Cable Act. To the extent there have been exclusive franchises, James believes they have had, and currently have, a minuscule effect on the development of competition in the industry as a whole.

Moreover, James reminds the Commission that, even in a particular market where an exclusive cable franchise may still exist, that market is not without retail video programming

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[6] "Editorial Changes"; Sikes Says He's Undecided on Cable Bill Veto Recommendation, *Communications Daily*, July 30, 1990, at 1 ("CATA Pres. Stephen Effros said . . . he's 'mystified' at local franchise recommendation [requiring non-exclusivity]because almost no cable franchises are exclusive[.]")

[7] *See, e.g., Fed. Ct. Finds Denial of Cable Franchise Renewal Was Proper*, The Entertainment Litigation Reporter (June 10, 1991) (30-year exclusive franchise expired in 1991).

[8] *See* n. 4, *supra.*

alternatives. A franchise agreement regulates only a cable operator's use of the public streets and rights-of-way. Consequently, competitors such as MMDS, SMATV, TVRO and DBS, who do not need franchise authority to provide video service, are generally unaffected by the existence of an exclusive cable television franchise. These services are even more viable today by virtue of the pro-competitive program access rules.[9] Cable operators, including those few with exclusive franchises, will also be subject increasingly to video dialtone competition by local telephone companies, which generally would not be precluded by a cable operator's exclusive franchise. It is a false predicate, therefore, that retroactive application of Section 621(a) is necessary to open up the local video market: there have been and are few examples of closed markets, and even in those few communities that have awarded exclusive franchises, consumers increasingly will have a variety of competitive alternatives.

2. It Appears That No Exclusive Franchises Have Been Granted Subsequent To The 1992 Cable Act

James believes that there have been *no* exclusive franchises granted since enactment of the 1992 Cable Act. Section 621(a) appears to have served its express purpose, as James could find in its research no reference to an exclusive contract being granted after passage of the Act. Indeed, the only reference in the literature appears to indicate the rejection of a post-1992 exclusive franchise proposal.[10] In addition, at least since the enactment of the 1992 Cable Act, if not earlier, franchising authorities have been advised by their trade associations *not* to grant

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[9] 47 U.S.C. § 548; 47 C.F.R. Part 76, Subpart O.

[10] *See Cable TV Firm Suing Forest Park*, Atlanta Journal and Constitution, Mar. 3, 1994, at Section I, 3 (community sued for attempting to award exclusive franchise.)

exclusive franchises.[11] Based on these findings, it would make no sense from a public policy perspective for the Commission to adopt a position that Section 621(a) ought to apply on a retroactive basis. There simply exists no need for such an extreme approach.

3. It Was Not Congress' Intent To Make Section 621(a) Retroactive

Moreover, such an extreme approach would be at odds with Congress' previously expressed intent. Neither the language nor the legislative history of Section 621(a) of the 1992 Cable Act reflect that Congress intended Section 621(a) to have retroactive effect. The Supreme Court has consistently declared that new federal statutes operate prospectively, not retroactively.[12] Retroactivity is particularly disfavored when not clearly supported by the statute and legislative history.[13] This rule is enforced with special vigilance when legislation is sought to be applied retroactively to vested property rights.[14]

The starting point for statutory interpretation is the statute's actual language.[15] There is no clear indication of retroactivity in the language of Section 621(a). Read in conjunction with Section 28 of the 1992 Cable Act, Section 621(a) indicated that, *after* December 4, 1992, local

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[11] *See, e.g., American City and County*, May 6, 1993 at 24.

[12] *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990).

[13] *See Landgraf v. USI Film Prod.*, __ U.S. __, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *Bennett v. New Jersey*, 470 U.S. 632, 641 (1985); *Greene v. United States*, 376 U.S. 149, 160 (1964) (*quoting Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)).

[14] *See, e.g., Holt v. Henley*, 232 U.S. 637, 639-40 (1914).

[15] *Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

franchising authorities were prohibited from granting additional exclusive franchises. James's research confirms that local franchising authorities have heeded this admonition.

Legislative history is an undependable guide,[16] but neither the conference nor committee reports stated explicitly, or even by clear implication, that Section 621(a) was to be retroactive or that preexisting exclusive franchises were to be invalidated.[17] There exist only the isolated remarks of two legislators addressing exclusivity,[18] but these remarks shed no light on the intent of Congress as a whole, and certainly do not support the conclusion that Section 621(a) was intended to be retroactive. Moreover, an attempt by one of these legislators to introduce four amendments to the 1992 Cable Act to affect preexisting franchises met with *no* success; the legislator withdrew all four amendments without any vote at committee.[19] The failure of

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[16] *See, e.g., Gersman v. Group Health Ass'n*, 975 F.2d 886, 890-91 (D.C. Cir. 1992), *cert. denied*, 114 S.Ct. 1642 (1994).

[17] *See, e.g.*, H.R. Rep. No. 628, 102d Cong., 2d Sess. 27 (1992) ("H.R. 4850 prohibits franchising authorities *from granting* exclusive franchises", implying a proscription on future acts.) (Emphasis added.)

[18] *See* 138 Cong. Rec. S14611 (daily ed. Sept. 22, 1992) (statement of Sen. Sasser); 138 Cong. Rec. H6527 (daily ed. July 23, 1992) (statement of Rep. Cooper). Both legislators represented the district in which the City of Jamestown is located, and their statements appear to have been designed to serve the specific interests of their constituent local franchising authority, which lost its challenge to the exclusive nature of the cable franchise agreement. *See* n. 1, *supra.* As one court aptly cautioned, "More bluntly put, a single member [of Congress] may be attempting to reassure his own constituency or *even to create legislative history for citation by courts.*" *Gersman*, 975 F. 2d at 892 (emphasis added). The personal views of these two former congressmen are not a reliable indication of the views of the other 99 Senators and 434 Representatives who voted on the 1992 Cable Act

[19] *See, e.g.*, Television Digest, June 22, 1992 at 2.

Congress to include these proposed amendments is strong evidence that it did not intend Section 621(a) to apply retroactively to preexisting exclusive franchises.[20]

Applying these principles, the Court of Appeals for the Sixth Circuit, in *James Cable Partners*, concluded that there was insufficient evidence of congressional intent to construe Section 621(a) as applying retroactively to preexisting franchises. In reaching that conclusion, the Court noted the contrary decision of the Eleventh Circuit in *Cox Cable*. However, as the Sixth Circuit observed in *James Cable Partners*, *Cox Cable* was decided prior to the U.S. Supreme Court's governing decision in *Landgraf v. USI Film Prod.*, __ U.S. __, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994). In *Landgraf*, the Supreme Court "rejected the idea that retroactive application can be inferred from indirect and ambiguous language," *James Cable Partners*, 43 F.2d at 280, *citing Landgraf*, 114 S. Ct. at 1495, as the Eleventh Circuit had done in *Cox Cable*. Thus, *Cox Cable*, decided prior to *Landgraf*, misapplies the Supreme Court's statutory construction principles regarding retroactivity, reaches an erroneous conclusion regarding the congressional intent underlying Section 621(a), and thus is entitled to no deference by the Commission in evaluating whether to recommend changes to Section 621(a). James submits that the Sixth Circuit's opinion in *James Cable Partners* appropriately construes Congress' intent in enacting Section 621(a).

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[20] *See Consumer Prod. Safety Comm'n*, 447 U.S. at 118-19 (Congress' decision not to adopt a Representative's alternative made his statement "not one that provides a reliable indication as to congressional intention."); *Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F. 2d 600, 607 (11th Cir.), *cert. denied*, 113 S.Ct. 182 (1992) ("This court is reluctant to assume that Congress intended to encompass *sub silentio* . . . what it expressly rejected. . . ."); *Cable Inv., Inc. v. Woolley*, 867 F.2d 151, 156 (3rd Cir. 1989); *Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-owners*, 991 F.2d 1169, 1174 (4th Cir. 1993).

4. It Would Be Unfair, And Likely Unconstitutional, To Make Section 621(a) Retroactive

It is worth a brief digression to share with the Commission James' experience, which may shed some light on the unfairness of retroactive application of Section 621(a), and one city's motivation in seeking retroactivity.

In 1988, before enactment of the 1992 Cable Act, James purchased the cable system in Jamestown, Tennessee, basing the purchase price in part on the exclusive nature of the system's franchise. The City of Jamestown explicitly approved the assignment to James of the exclusive cable television franchise, acknowledging that the exclusive franchise was valid, and in full force and effect. In return for the City's approval of assignment of the franchise, James agreed *inter alia* to pay the City an increased franchise fee, consisting of five percent of its gross revenues, and to make improvements to the system. In 1990, however, after having reaped benefits from its contract with James, the City sought to renege on its deal. In quick succession, it awarded itself a franchise, built a cable television system, and began competing with James in derogation of James' exclusive franchise.

James brought suit in the Tennessee courts. The Court of Appeals of Tennessee held that James' exclusive franchise was fully enforceable under both federal and state law, and that the City should be enjoined from further illegal operation of its competing system. The Supreme Court of Tennessee, and the United States Supreme Court, both denied the City's requests for further review.

In 1991 and 1992, as Congress considered including a provision in the 1992 Cable Act that would prohibit the *future* grant of exclusive franchises, the City of Jamestown was one of the few, but most ardent, proponents of applying such a prohibition retroactively to preexisting

exclusive franchises. Notwithstanding that it had expressly awarded such a franchise, that it had exacted concessions as the *quid pro quo* for approval of the assignment of that franchise to James, and that it had reaped benefits from the award, the City now unabashedly sought legislation that would rescind retroactively the exclusivity of James' franchise. After four failed attempts by the City's congressional representatives to gain adoption of amendments that would explicitly have made Section 621(a) of the 1992 Cable Act retroactive, the City called upon its Senator and Representative to attempt to generate legislative history that would attribute a legislative intent, where none was intended, by Congress that Section 621 be applied retroactively. Ultimately, the City was forced to settle for insertion in the *Congressional Record*, by the City's representatives, of *their* view that Section 621(a) should be given retroactive effect, the very proposal that had failed four times when offered as amendments.

Following the enactment of Section 621, litigation ensued in two Circuits regarding whether Congress intended that Section 621 be applied retroactively to preexisting franchises. In an ironic twist, although the U.S. Court of Appeals ruled in *Cox Cable* that Section 621 should be applied retroactively, the U.S. Court of Appeals for the Sixth Circuit ruled, in the City of Jamestown's own case -- construing the legislative history that the City had worked so hard to fabricate out of whole cloth -- that Congress had not intended Section 621 to be applied retroactively to preexisting exclusive franchises. The City was again enjoined from operating its illegal system in derogation of James' exclusive rights.

What wants to be noted here is the unfairness of retroactively rescinding bargained-for exclusivity, where an operator like James paid its predecessor a purchase price for the system that was based in significant measure on the exclusive nature of the franchise, where the operator

made costly concessions to the franchising authority in obtaining exclusivity when the franchise was granted or assigned to it, and where the franchising authority reaped, and presumably would continue to enjoy, the benefit of those concessions even if exclusivity were to fall. This unfairness would be most intolerable in instances where the franchising authority, which granted the exclusive franchise and extracted substantial benefits in return, itself were to seek to compete with its exclusive franchisee and avoid the bargain that it struck.

James submits that it was fairness considerations such as these that led Congress, in 1992, to reject proposals to make Section 621(a) retroactive. Congress' action was also guided, no doubt, by a concern that retroactive application of Section 621(a) would violate the Takings Clause of the Fifth Amendment, because such action would defeat the cable operator's constitutionally protected property rights in its exclusive cable television franchise.[21] A cable franchise, once granted by the government for valuable consideration and accepted by the franchisee, becomes property in the form of a binding contract between the government and the franchisee.[22] Given that an exclusive franchise constitutes private property, retroactive application of Section 621(a) would constitute a *per se* taking of that property without just compensation,

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[21] In fact, Congressman Dingell warned during a Rules Committee meeting that voiding of existing exclusive franchises could cause "cable operators [to] sue to hold gov[ernmen]t liable for any losses incurred in abrogated agreements. . . ." *House Divided; Final Cable Bill Debate Set For Today*, Communications Daily, July 23, 1992, at 1-2.

[22] *See Triad CATV, Inc. v. City of Hastings*, No. 90-1082 1990 U.S. App. LEXIS 18212 at *12 (6th Cir. 1990); *Lamb Enter. Inc. v. City of Toledo*, 437 F.2d 59, 60 (6th Cir. 1971); *United States v. Slay*, 717 F. Supp. 689, 693 (E.D. Mo. 1989); *Carlson v. Village of Union City, Michigan*, 601 F. Supp. 801, 813 (W.D. Mich. 1985).

as it would destroy the operator's *exclusive* right to use rights-of-way to operate a cable system and to exclude others from doing so.[23]

The answer to the Commission's first question, therefore, is relatively clear: few cable operators have exclusive franchises, and those that do exist were granted long before the 1992 Cable Act. Congress did not mean to disturb this circumstance, and the effect on the industry today is *de minimis* and grows even more insubstantial as these franchises expire. Moreover, in the relatively few markets that do still have exclusive franchises, alternative multi-channel video services that are not precluded by franchise exclusivity are, or increasingly are becoming, available. Local franchising authorities do not today grant exclusive franchises or renew franchises on an exclusive basis, due to the prospective proscription contained in Section 621(a), which should serve to further open the local video programming market.

B. "How many, if any, applications for competitive franchises have been filed since the enactment of the 1992 Cable Act? How many competitive franchises have been awarded? How many have been denied? Has Section 621(a) promoted the award of competitive franchises?"

As with the Commission's first question, James was unable to locate any empirical data to answer the Commission's second set of inquiries. However, James cautions that should the Commission determine that few competitive applications have been filed or granted, or that they have tended to be denied, this may have less to do with Section 621(a) and more to do with the quality of unsuccessful franchise applicants (if they exist), and the nature and scope of franchise obligations faced by new entrants.

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[23] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27, 433 (1982); *Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-owners*, 737 F. Supp. 903, 907 (E.D. Va. 1990), *aff'd*, 991 F. 2d 1669 (4th Cir. 1993); *Cable Holdings of Ga., Inc.*, 953 F.2d at 604-05.

Local franchising authorities retain the discretion under Section 621(a) to reject a competing franchise application so long as the rejection is conditioned on reasonable grounds.[24] Thus, entities denied competitive video programming franchises may have run afoul of reasonable local requirements that are entirely proper under federal law. In addition, new competitors may be intimidated by franchise obligations that cable operators have satisfied for decades; the requirements to provide PEG access channels, to pay significant franchise fees, to install institutional networks, and to make a variety of other concessions may prove to be the most significant obstacle to the development of local cable television competition. Similarly, the increasing burdens of federal regulation may well be discouraging smaller operators from entering the industry, particularly in an overbuild market. Finally, many new competing multi-channel video providers — as identified above, MMDS, SMATV, TVRO and DBS fit this category — do not need franchise authority to offer substantially the same service provided by franchised and regulated cable operators.

Given that reasons unrelated to franchise exclusivity may explain any apparent lag in the development of multiple franchising, James submits that the Commission would have no credible factual grounds upon which to base a conclusion that any change in Section 621(a) is necessary, and certainly no warrant to conclude that Section 621(a) needs to be made retroactive in effect.

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[24] Section 621(a)(1)provides:

> A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not *unreasonably* refuse to award an additional competitive franchise.

47 U.S.C. § 541(a) (emphasis added).

The statute is working as it should on a *prospective* basis, and public policy would be ill served by manipulating otherwise innocuous data received under this section to support retroactive application of Section 621(a).

C. "To what extent have the activities of local franchising authorities been an impediment to overbuilding by additional cable systems? Have incumbent cable operators used local franchising processes to delay or prevent overbuilding?"

James has identified above some of the legitimate reasons why local franchising of competing cable operators may not be occurring as rapidly or extensively as the Commission or Congress may have hoped or expected. James also notes that it is aware of no current evidence of a cable operator that has abused the franchising process with regard to a competitive entrant. This is not to say that a cable operator should not avail itself of every right owed it under local, state or federal law to ensure that an overbuilder meets the same franchise obligations as imposed on the incumbent cable operator. James cautions the Commission, therefore, to weigh carefully the sovereignty of local franchising authorities and the rights of franchised cable operators when assessing the responses to this question. Federal law clearly allows franchising authorities discretion in awarding additional cable franchises, and the right to impose on new entrants substantially similar franchise conditions as have been required of an incumbent. The Commission cannot ignore local authority or principles of fairness in a rush to open the local cable market to competition.

CONCLUSION

James believes that the Commission's questions, while well-intentioned, may not fully illuminate the debate regarding opening the local market to retail video programming competition. In particular, given the very few exclusive franchises in effect today, the *de minimus* impact of

such franchises on the development of competition in the industry as a whole, and the increasing availability of alternative multi-channel video services even in those few communities that have granted exclusive franchises, an empirical case for retroactive application of Section 621(a) simply cannot be made. Moreover, considerations of fairness and fundamental constitutional rights dictate that preexisting exclusive franchises not be retroactively rescinded. Finally, franchising authorities that have willingly entered exclusive franchise agreements should not now profit from unfair dissolution of the bargain they struck.

Respectfully submitted,

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